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In The

# Supreme Court of the United States

October Term, 1997

LUFTHANSA GERMAN AIRLINES,

*Petitioner,*

vs.

LEONARD KRYS AND REBECA KRYS,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. WHERE AN AIRLINE PASSENGER SUFFERS A HEART ATTACK DURING A FLIGHT AND THE DAMAGE TO HIS HEART IS AGGRAVATED BY THE NEGLIGENCE OF THE CREW, DOES THE AGGRAVATION CONSTITUTE AN "ACCIDENT" UNDER THE WARSAW CONVENTION, A TREATY OF THE UNITED STATES?

2. IN THIS CASE WHICH OCCURRED DURING AN INTERNATIONAL FLIGHT OVER THE HIGH SEAS, IF THIS COURT ACCEPTS *CERTIORARI* AND DETERMINES THAT THE ACTION IS GOVERNED BY THE WARSAW CONVENTION, SHOULD THIS COURT ADDRESS THE ADDITIONAL QUESTION OF WHETHER, IN ACTIONS GOVERNED BY THE WARSAW CONVENTION, ISSUES NOT SPECIFICALLY ADDRESSED IN THE CONVENTION SHOULD BE DECIDED UNDER GENERAL MARITIME LAW, OR SHOULD THE DISTRICT COURT ADDRESS THAT CONTENTION IN THE FIRST INSTANCE ON REMAND?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

STATEMENT OF THE CASE ..... 1

ARGUMENT ..... 7

CONCLUSION ..... 17

# TABLE OF AUTHORITIES

Page

CASES

*Abramson v. Japan Airlines*, 739 F. 2d 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985).. 7, 11, 12, 13

*Adamsons v. American Airlines, Inc.*, 105 Misc. 2d 787, 433 N.Y.S. 2d 366 (S. Ct. 1980), *aff'd*, 87 A.D. 2d 785, 449 N.Y.S. 2d 487 (S. Ct., App. Div. 1982), *rev'd on other grounds*, 58 N.Y. 2d 42, 457 N.Y.S. 2d 771, 444 N.E. 2d 21 (Ct. App. 1982), *cert. denied*, 463 U.S. 1209 (1983) ..... 8

*Air France v. Saks*, 470 U.S. 392 (1985)....10, 11, 12, 13, 14

*Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467 (1974) ..... 9

*Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987)..... 16

*Bob Jones University v. Simon*, 416 U.S. 725 (1974) ..... 9

*Cooper v. Aaron*, 358 U.S. 1 (1958) ..... 9

*Fischer v. Northwest Airlines, Inc.*, 623 F. Supp. 1064 (N.D. Ill. 1985) ..... 7

*Forsyth v. Hammond*, 166 U.S. 506 (1897)..... 9

*Hudson v. McMillian*, 503 U.S. 1 (1992) ..... 16

*International Brotherhood of Electrical Workers AFL-CIO v. Hechler*, 481 U.S. 851 (1987)..... 16

*Johnson v. DeGrandy*, 512 U.S. 997 (1994)..... 16

*Kokoszka v. Belford*, 417 U.S. 642 (1974) ..... 9

*MacDonald v. Air Canada*, 439 F. 2d 1402 (1st Cir. 1971)..... 14

*Miree v. DeKalb County, Georgia*, 433 U.S. 25 (1977) .... 16

*Missouri v. Hunter*, 459 U.S. 359 (1983) ..... 9

TABLE OF AUTHORITIES – Continued

Page

*Northern Trust Co. v. American Airlines, Inc.*, 96 Ill. Dec. 371, 142 Ill. App. 3d 21, 491 N.E. 2d 417 (1986) ..... 8

*Reynolds v. Sims*, 377 U.S. 533 (1964) ..... 9

*Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992) ..... 16

*Scherer v. Pan American World Airways, Inc.*, 54 A.D. 2d 636, 387 N.Y.S. 2d 580 (1976)..... 14

*Seguritan v. Northwest Airlines, Inc.*, 86 A.D. 2d 658, 446 N.Y.S. 2d 397 (S. Ct., App. Div.), *aff'd*, 57 N.Y.S. 2d 767, 454 N.Y.S. 2d 991, 440 N.E. 2d 1339 (Ct. App. 1982)..... 9

*Tandon v. United Air Lines*, 926 F. Supp. 366 (S.D.N.Y. 1996) ..... 7

*Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992)..... 16

*Tseng v. El Al Israel Airlines, Ltd.*, 122 F. 3d 99 (2d Cir. 1997) .....13, 14

*Varity Corp. v. Howe*, ___ U.S. ___, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996)..... 9

*Walker v. Eastern Air Lines, Inc.*, 775 F. Supp. 111 (S.D.N.Y. 1991) ..... 8

*Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653 (1974)..... 9

*Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400 (E.D. Pa. 1977) ..... 8

*Youakim v. Miller*, 425 U.S. 231 (1976)..... 16

*Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996) ..... 15

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITY

"Warsaw Convention", Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted at 49 U.S.C.A. § 40105 (1997) ..... 1

## BRIEF IN OPPOSITION

The respondents, Leonard and Rebeca Krys, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case. That decision is reported at 119 F. 3d 1515 (1996), and is reprinted in the petitioner's Appendix at A-4.

## STATEMENT OF THE CASE

### 1. The Proceedings Below.

As the Court of Appeals pointed out (A-8 to A-9 n.8), Petitioner Lufthansa's initial position in the district court was the direct opposite of the position which Lufthansa later advanced in the district court, the court of appeals, and this Court. Lufthansa initially moved for summary judgment on the ground that Mr. Krys' "heart attack was not the result of an 'accident', [and] thus his claims are not cognizable under the Warsaw Convention";[1] and Lufthansa also argued that "[t]he failure to provide medical treatment to a passenger is not an accident under the Warsaw Convention" (R2-75-7-8).[2] The plaintiffs responded by citing what the Court of Appeals called the "overwhelming contrary case law" (A-9 n.8), holding that if an action is not governed by the Warsaw Convention,

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted at 49 U.S.C.A. § 40105 (1997).

[2] The citation is to Volume II of the Record on Appeal in the Court of Appeals, Document No. 75, pages 7-8.

then the plaintiffs are free to pursue their common-law remedies (R2-89-6-7). Recognizing its strategic error, Lufthansa switched sides in its reply memorandum, arguing for the first time that although Mr. Krys' heart attack itself was not an accident cognizable under Warsaw, "[i]f there was post-heart attack crew negligence, and if this negligence did aggravate the injury, this negligence would certainly constitute a Warsaw Convention 'accident' " (R2-94-1). The district court denied the motion for summary judgment, finding that "the post-heart attack treatment of passenger Leonard Krys was not an 'accident' within the meaning of the Warsaw Convention as defined by the United States Supreme Court" (A-58); and the magistrate reiterated that conclusion in the Findings of Fact and Conclusions of Law (A-52 to 53).

As the Court of Appeals noted (A-24 to A-25 n.19), given that Lufthansa had timely argued for admiralty law only on the assumption that the Warsaw Convention was applicable, raising no timely contention that admiralty law should govern even if the Convention were not applicable, the district court's ruling on the non-applicability of Warsaw necessarily mooted the single question of admiralty law timely presented by Lufthansa. As the Court of Appeals noted (A-24 to A-25 n.19), "all the pretrial documents . . . clearly contemplate that, absent preemption by the Warsaw Convention or the Federal Aviation Act,[3] state law would apply"; "once the district court rejected appellant's preemption arguments, all parties and the court understood that the case would be tried

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[3] As the Court of Appeals noted (A-7 n.5), Lufthansa dropped its FAA pre-emption argument on appeal.

under state law negligence principles"; it was only "[t]wo months *after* the trial, in its proposed Findings of Fact and Conclusions of Law, [that] Lufthansa cited both Florida cases and maritime cases in support of its argument that Lufthansa did not breach its duty of care" (emphasis in original);[4] and "[e]ven then, the assertion was made in a short paragraph consisting only of a conclusory assertion and a citation to two cases." The plaintiffs argued in response "that the point was waived," and the Court of Appeals construed the district court's order "as a rejection on the basis of untimeliness, which is amply warranted. Only after the court's order did Lufthansa finally present a fully developed argument that maritime law should apply" (A-25 n.19).

Moreover, as the Court of Appeals further noted (A-24 n.19), Lufthansa "failed to argue this point as clearly as it should have in its initial brief on appeal," contending only "that maritime law should fill the interstices not covered by the Convention." Lufthansa argued only "in its reply brief and at oral argument that maritime law should govern this case even if the Warsaw Convention does not apply." *Id.* In light of Lufthansa's omissions both at the trial level and at the appellate level, the Court of Appeals "decline[d] to address the question of whether maritime law should have been applied" (A-25 n.19). Having affirmed the district court's ruling that the instant

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[4] Lufthansa notes (petition at 6) that the point was made in its proposed findings, without informing the Court that its proposed findings were filed two months after the trial, and raised the point for the first time.

case is not governed by the Warsaw Convention, it therefore was unnecessary for the Court of Appeals to consider whether in proper cases the Warsaw Convention will borrow principles of admiralty law.

**2. The Plaintiffs Presented Overwhelming Evidence that Lufthansa Was Negligent in Failing to Recognize the Manifest Symptoms of Mr. Krys' Heart Attack, and that the Resulting Delay in Treatment Significantly Aggravated its Effects.**

As the Court of Appeals recognized, for the purpose of adjudicating Lufthansa's jurisdictional argument, "we need only sketch out the nature of the case," and "we resolve all disagreements regarding the facts in favor of the district court's findings" (A-5 n.1). In this Court, Lufthansa has argued only the question of Warsaw jurisdiction and the dependent question of whether in proper cases Warsaw borrows maritime law; neither question directly implicates the underlying facts. Therefore, we will not rebut at length Lufthansa's self-serving recitation of its own evidence (petition at 3-4).

We refer the Court to the district court's findings (A-38 to A-51), based upon the evidence, summarized by the Court of Appeals (A-18 to 33), that Lufthansa was negligent notwithstanding a physician passenger's self-serving disclaimer,[5] in failing to recognize that Mr. Krys

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[5] The passenger, Dr. Fischmann, was heading back to Germany after a vacation, and was scheduled to see patients the following morning; thus, he would have been significantly inconvenienced if the flight had been diverted (R5-201).

was suffering a heart attack, and that Lufthansa's negligence contributed substantially to Mr. Krys' significant injuries. Beginning between an hour and two hours into the flight (R5-60, 63, 82-83, 107, 175, 212-13; R6-369; R7-477, 479, 485), Mr. Krys was observed by two other passengers to experience difficulty breathing; unrelenting perspiration, through his clothing; a pallor turning his face white or gray; an upset stomach; severe nausea; dizziness; confusion; and beginning with his second trip to the bathroom, "unbearable, crushing, excruciating" chest pain (R5-138), which radiated into his arms and other parts of his body (R5-107-08, 143), which was "constant" (*id.*) from that time until Mr. Krys was given an analgesic after the plane had landed in Frankfurt (R5-117), and which was so unbearable that he was forced to remain in almost constant movement while either sitting or walking throughout the plane – his arms behind his head or raised in the air (R5-48-51, 57-58, 61, 107-08, 110-12, 114, 116, 137-38, 140-41, 146, 163, 170, 172, 174-77; R7-473, 476-80, 508-09). Mr. Krys reported all of these symptoms both to the physician passenger, Dr. Fischmann, and to the purser (R5-49, 59, 111, 114, 137, 140, 143-44). Even Lufthansa's witnesses conceded what Mr. Krys and the two eyewitnesses knew (R5-54, 59, 65, 112; R6-311; *see* R5-176; R7-481-82) – that the symptoms reported by Mr. Krys and confirmed by the two eyewitnesses overwhelmingly signaled a heart attack (R5-85-86, 99, 204, 243; R7-421-22). Indeed, Lufthansa's flight operations manual (*see* Plaintiffs' Exhibit 3) lists precisely these symptoms as the symptoms of a heart attack (R5-85-86; R7-390-91); and Lufthansa's employees were trained to recognize these symptoms (R5-190; R7-463). Both the

plaintiffs' experts (R5-214; R6-313-14, 343, 349, 369) and the defendant's expert (R7-440, 452) agreed that Mr. Krys exhibited the classic symptoms of a heart attack. Some of those symptoms were inconsistent with mere angina (R7-391); not surprisingly, they were not relieved by nitroglycerin (R5-54, 56-57, 61, 110-12, 114), which would have relieved angina within a few minutes (R5-196-97, 214-15; R6-327).

On the basis of the foregoing evidence alone, the factfinder certainly could have concluded that notwithstanding Dr. Fischmann's advice, Lufthansa's employees knew or should have known that Mr. Krys was suffering a heart attack, and thus that they were required by common sense and by Lufthansa's operations manual (*see* Plaintiffs' Exhibit 2) to abort the flight at once (R5-83-85; R7-389-90, 556). In addition, a Lufthansa official admitted that the symptoms reported by Mr. Krys required Lufthansa to land the plane (R5-83), and the plaintiffs offered expert testimony that Lufthansa was negligent for failing to follow its own procedures (R6-311). Moreover, wholly apart from Lufthansa's internal policies, the plaintiffs' experts testified that its obligations were not relieved by Dr. Fischmann's intervention (R6-302, 311, 341-42); that Lufthansa was negligent in failing to divert the flight to the nearest airport (R6-304, 337; *see also* R7-542-53); and that Lufthansa was negligent in failing to ascertain Dr. Fischmann's knowledge or training (R6-301-337-38; *see* R5-92; R7-275, 554, 563); failing to verify the doctor's impression by monitoring the passenger more closely (R6-302-310, 312, 340; *see* R5-88); and forbidding Mr. Krys' request to lie down in the galley between business class and tourist class (*see* R5-112-13;

R6-249) – a decision which the expert found "particularly reprehensible" (R6-345; *see* R7-543-44). As the Court of Appeals found, there is substantial record evidence that Lufthansa was negligent in failing to heed Mr. Krys' manifest symptoms; and there is substantial evidence that the effects of his heart attack were significantly worsened by the delay occasioned by that negligence (*see* R5-51, 54-55, 84, 114-15, 175, 219; R6-304-10, 353-55, 360, 364-65, 371).

## ARGUMENT

**1. The Federal Decisions Unanimously Support the Court of Appeals' Conclusion that Lufthansa's Negligence in Failing to Treat Mr. Krys' Natural Condition Was Not a Warsaw Accident; a Single Contrary State-Court Decision on This Federal Question Does Not Warrant This Court's Review.**

As the Court of Appeals recognized (A-11 to A-15), every federal court to consider the present question – whether an airline's asserted negligence in reacting or failing to react to a passenger's natural condition constitutes a Warsaw "accident" – has held that the Convention is not implicated by such an event. *See Abramson v. Japan Airlines*, 739 F. 2d 130, 133 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985) (asserted negligence in worsening the passenger's hernia condition was not a Warsaw accident); *Tandon v. United Air Lines*, 926 F. Supp. 366, 369-70 (S.D.N.Y. 1996) (asserted negligence in failing to have oxygen on board for treatment of heart attack); *Fischer v. Northwest Airlines, Inc.*, 623 F. Supp. 1064, 1065-66 (N.D.

Ill. 1985) (asserted negligence in failing to assist a passenger suffering a heart attack). *Cf. Walker v. Eastern Air Lines, Inc.*, 775 F. Supp. 111 (S.D.N.Y. 1991) (parties agreed that the plaintiff had not alleged a Warsaw accident in the airline's inadequate care, assertedly aggravating the decedent's asthma). *See also Northern Trust Co. v. American Airlines, Inc.*, 96 Ill. Dec. 371, 376, 142 Ill. App. 3d 21, 28, 491 N.E. 2d 417, 422 (1986) (where the plaintiff's decedent alleged that the airline was negligent in responding to a heart attack, the court held that "no accident occurred in this case. An accident has been defined as an unusual or unexpected happening. . . . [The heart condition] was an inherent weakness or disability and was not the result of an unusual or unexpected happening which was connected with the flight"); *Adamsons v. American Airlines, Inc.*, 105 Misc. 2d 787, 791, 433 N.Y.S. 2d 366, 369 (S. Ct. 1980), *aff'd*, 87 A.D. 2d 785, 449 N.Y.S. 2d 487 (S. Ct., App. Div. 1982), *rev'd on other grounds*, 58 N.Y. 2d 42, 457 N.Y.S. 2d 771, 444 N.E. 2d 21 (Ct. App. 1982), *cert. denied*, 463 U.S. 1209 (1983) (in addition to its primary holding that the plaintiff was not a passenger under the Warsaw Convention, the court found "no accident within the meaning of the Convention," because the plaintiff's injury – aggravation of a disability because the airline declined to fly her back to New York for treatment – occurred " 'in accordance with ordinary and routine operating procedures under conditions which were free of any malfunctions or abnormalities . . . ' "), *quoting Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400, 412 (E.D. Pa. 1977).

No federal court has departed from this line of authority. Only a single New York appellate decision –

*Seguritan v. Northwest Airlines, Inc.*, 86 A.D. 2d 658, 659, 446 N.Y.S. 2d 397, 398 (S. Ct., App. Div.), *aff'd*, 57 N.Y.S. 2d 767, 454 N.Y.S. 2d 991, 440 N.E. 2d 1339 (Ct. App. 1982) – has held that the airline's inattention to a passenger's heart attack constituted a Warsaw accident. However, Lufthansa has cited no authority that a state appellate ruling on a federal question, which of course has no precedential value in any federal court,[6] could warrant this Court's consideration in the face of unanimous contrary authority in the federal system. Typically, in the absence of a federal/state conflict implicating questions of state sovereignty, *see, e.g., Forsyth v. Hammond*, 166 U.S. 506 (1897) (conflicting federal and state-court rulings regarding the validity of an annexation of territory), this Court will accept review to resolve a conflict only between federal Courts of Appeal.[7] Lufthansa has cited no authority that a single state appellate decision on a federal question is sufficient to invoke this Court's authority to resolve a conflict of extant decisions.

Moreover, as the Court of Appeals concluded, although the question may be open to some discussion, Lufthansa has offered no compelling argument that the unanimous line of federal decisions defining a Warsaw

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[6] *See Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *Reynolds v. Sims*, 377 U.S. 533, 566 (1964); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

[7] *See, e.g., Varity Corp. v. Howe*, ___ U.S. ___, 116 S. Ct. 1065, 134 L. Ed. 2d 130, 138 (1996); *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 656 & n.7 (1974); *Kokoszka v. Belford*, 417 U.S. 642, 643 (1974); *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 468 (1974); *Bob Jones University v. Simon*, 416 U.S. 725, 734 (1974).

"accident" conflicts either with the language of the Convention or with *Air France v. Saks*, 470 U.S. 392, 396 (1985), holding that a passenger's loss of hearing, assertedly "caused by the normal operation of the aircraft's pressurization system," was not compensable as a Warsaw "accident." The Court began in *Air France v. Saks* with the language of the Convention, noting that Article 17 compensates death or bodily injury "if the accident which caused the damage" occurred in international air transportation, while Article 18 covers destruction or loss of baggage or goods "if the occurrence which caused the damage" took place in international air transportation. 470 U.S. at 397-98. The difference in language "implies that the drafters of the Convention understood the word 'accident' to mean something different than the word 'occurrence' ", *id.* at 398; and Article 17 also "refers to an accident *which caused* the passenger's injury, and not to an accident which *is* the passenger's injury", *id.* – language through which "the drafters of the Warsaw Convention apparently did make an attempt to discriminate between 'the cause and the effect'; they specified that air carriers would be liable if an accident caused the passenger's injury." *Id.* at 398-99 (emphasis in original).

The Convention does not itself define "accident," but the original French operates as a reference to "the *event* of a person's injury" and "to describe a *cause* of injury, and when the word is used in this latter sense, it is usually defined as a fortuitous, unexpected, unusual, or unintended event. . . . The text of the Convention consequently suggests that the passenger's injury must be caused by an unexpected or unusual event." *Id.* at 400 (emphasis in original). The question, therefore, is "what causes can be

considered accidents," *id.* at 404; and consistent with the language and history of the Convention, the Court agreed with decisions of our "sister signatories" (*id.*) holding that "Article 17 . . . embraces causes of injury that are fortuitous or unpredictable" – that is, "that the passenger's injury be caused by a sudden or unexpected event other than the normal operation of the plane." *Id.* at 404. These sister holdings "are in accord with American decisions which . . . refuse to extend the term to cover routine travel procedures that produce an injury due to the peculiar internal condition of the passenger." *Id.* at 404-05.[8] Thus, "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply." *Id.* at 406. In contrast, when the injury "is the product of a chain of causes," "we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger." *Id.*

In keeping with this reasoning, the Court of Appeals in the instant case properly concluded (A-14 to A-15) that no link in the chain of events could be said to have

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[8] Among those "American decisions," the Court noted, 470 U.S. at 405, is *Abramson v. Japan Airlines Co.*, 739 F. 2d 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985), which the Court described as holding that "sitting in airline seat during normal flight which aggravated hernia [was] not an 'accident' ", and which the Court cited for the proposition that the Convention does not cover "routine travel procedures that produce an injury due to the peculiar internal condition of a passenger." 470 U.S. at 405.

constituted "a sudden or unexpected event other than the normal operation of the plane." *Air France v. Saks*, 470 U.S. at 404. To the contrary, Mr. Krys' experience reflected "the peculiar internal condition of the passenger," *id.* at 404-05, and it was aggravated not by "a sudden or unexpected event other than the normal operation of the plane," but rather by the "normal operation of the plane" – that is, by continuation of its scheduled, uninterrupted flight. As the appellate court put it (A-14 to A-15):

> [I]f we substitute a purely factual description of the relevant events in place of the legal conclusion represented by "crew negligence," the conclusion that no "accident" occurred is seen as the more reasonable conclusion. If, in *Abramson*, the aggravating event is having to sit upright in an airline seat throughout the duration of the flight, then it seems clear that the aggravation does not arise from an "unexpected or unusual event" – instead, the aggravation injury arises solely from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." By the same token, if, in the instant case, the aggravating event is the continuation of the flight from its scheduled point of departure to its scheduled point of arrival, then it seems clear that the aggravation injury arises not from an "unexpected or unusual happening," but rather from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft."

Thus, the Court of Appeals derived from the unanimous federal decisions its holding that "the proper approach is indeed to look at a purely factual description

of the events that allegedly caused the aggravation injury suffered by the plaintiff" – an approach "in accord with the plain meaning of the phrase 'event or happening' as used in the *Air France* Court's definition of 'accident' and with the manner in which the Court described decisions of the lower courts" (A-15). "In particular, we note that in summarizing the *Abramson* decision in a parenthetical, the Court described the relevant event as 'sitting in airline seat during normal flight' notwithstanding the fact that the plaintiff had attempted to make out the Warsaw Convention claim based on the airline's 'acts or omissions' – i.e., its negligence" (A-15). Thus, "looking solely to a factual description of the aggravating event in this case – i.e., the continuation of the flight to its scheduled point of arrival – compels a conclusion that the aggravation injury was not caused by an 'unusual or unexpected event or happening that is external to the plaintiff' " (A-17).

As the Court of Appeals emphasized, similar reasoning is found throughout the federal decisions on this question. Most recently, in *Tseng v. El Al Israel Airlines, Ltd.*, 122 F. 3d 99, 103 (2d Cir. 1997), *petition for cert. pending*, No. 97-475, in which the passenger was identified as a security risk, and subjected to a personal search which assertedly caused both physical and psychological trauma, there was no Warsaw "accident" in part because "being subjected to a personal search is a distasteful but a routine procedure of international air travel. As such, it cannot be considered an 'accident' regardless of a passenger's subjective reaction to it." Such an event "is part of every passenger's experience," *id.*, and the language of the Convention "does not include illness suffered by the

passenger as a reaction to the ordinary events and procedures of air transportation." *Id.* at 104. *Accord, MacDonald v. Air Canada,* 439 F. 2d 1402 (1st Cir. 1971) (fainting while waiting for baggage); *Scherer v. Pan American World Airways, Inc.*, 54 A.D. 2d 636, 387 N.Y.S. 2d 580 (1976) (sitting in an airline seat during normal flight aggravated passenger's thrombophlebitis). At the least, the *Tseng* court's formulation of the appropriate legal standard is accurate, even if one might debate its application to the facts of *Tseng*. The appropriate question, which must be applied case by case, is whether the plaintiff's condition was caused or aggravated by an extraordinary extrinsic event, or instead by the passenger's internal condition and/or the normal operation of the flight. Even if the application of that standard is debatable in *Tseng*, it is not debatable here.

Here, regardless of the airline's asserted negligence, the passenger's injury was caused not by "a sudden or unexpected event other than the normal operation of the plane," *Air France v. Saks,* 470 U.S. at 404, but rather by "a routine procedure of international air travel." *Tseng v. El Al Israel Airlines, Ltd.*, 122 F. 3d at 103. The unanimous reasoning of the federal decisions is correct, and is consistent with *Air France v. Saks*. No event in the chain of events leading to Leonard Krys' injury resulted from an unusual or unexpected event. No Warsaw accident occurred. No basis for review by certiorari has been presented.

**2. In Holding That the Instant Action Is Not Governed by the Warsaw Convention, the Court of Appeals' Decision Cannot Implicate the Question of What Law Applies in a Case Which is Governed by the Warsaw Convention.**

In holding that the instant case is not governed by the Warsaw Convention, the Court of Appeals had no occasion to address the question of what law applies in an action which is governed by the Warsaw Convention. As Lufthansa points out (petition at 18), that issue most recently was addressed in *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996), holding that because the Convention itself is silent on the elements of compensatory damages in an action governed by the Warsaw Convention, the Court should apply whatever choice-of-law formula would exist in the absence of the Convention. Given its holding that the Convention does not apply in this case, the Court of Appeals of course had no occasion to consider what law should apply in an action which is governed by the Convention – on the issue of liability, compensatory damages, attorneys' fees, or anything else. Accordingly, the choice-of-law question would be appropriate for consideration only if this Court were to grant certiorari and reverse the Court of Appeals' determination that this is not a Warsaw case. And even in that event, it seems probable that the Court would remand the case to the Court of Appeals, and eventually to the district court, to consider all issues then arising under Warsaw, including the question of what law applies. This Court repeatedly has declined to consider in the first

instance questions which were not addressed by either the district court or the court of appeals.[9]

As a footnote, we should also acknowledge Lufthansa's protestation (petition at 19-20) that both the district court and the Court of Appeals assertedly ignored its contention that even if this is not a Warsaw case, admiralty law, and not Florida law, should govern the plaintiffs' claims. As we noted above, the Court of Appeals expressly declined to consider Lufthansa's invocation of admiralty law outside the context of a Warsaw action, both because the argument was presented too late in the district court, whose failure to address the point was construed "as a rejection on the basis of untimeliness, which is amply warranted" (A-25 n.19),[10] and because even on appeal, the argument was presented by Lufthansa only "in its reply brief and at oral argument . . . " (A-24 n.19). As we noted above, this Court consistently has declined to consider issues not squarely addressed by the courts below, especially when those issues were not properly presented to the courts below.

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[9] *See, e.g., Johnson v. DeGrandy*, 512 U.S. 997 (1994); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992); *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 441 (1992); *Hudson v. McMillian*, 503 U.S. 1, 12 (1992); *International Brotherhood of Electrical Workers AFL-CIO v. Hechler*, 481 U.S. 851, 862 n.5 (1987); *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 34 (1977); *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

[10] *See Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (appellate court's failure to address an issue warrants a presumption that it was not preserved for appellate review).

Therefore, the only issue preserved for this Court's consideration is the issue of whether the plaintiffs' claim should have been governed by the Warsaw Convention, and on that issue, Lufthansa has presented no argument warranting this Court's review.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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